

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

8-1-74

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P/S

74-1554

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

MICHAEL PATERNO, GEORGE DENTI
and PATERNO AND SONS, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**PETITION FOR REHEARING AND HEARING
EN BANC FOR APPELLANT GEORGE DENTI**

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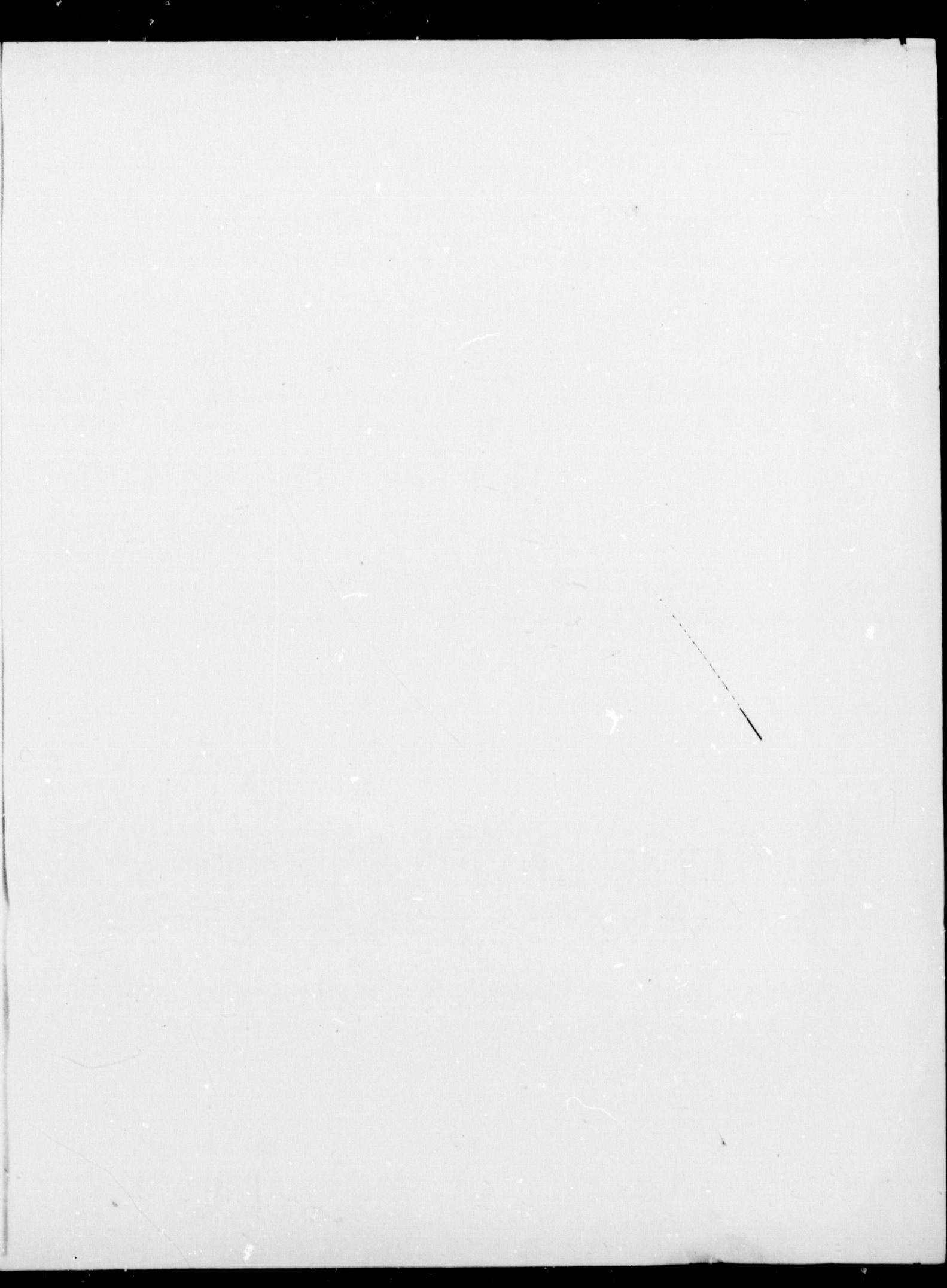
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Since the witness James O'Reilly had been granted immunity at the trial at the Govern- ment's instance by a separate order relating to his trial testimony, it was error and a violation of due process for the trial Court to rule that such immunity would not extend to the testimony which O'Reilly would give as a defense witness either on direct- or on cross-examination, and to refuse to extend such immunity to him, particularly in view of the fact that O'Reilly's need of immunity was suggested only by the prosecutor and the trial Court and only in connection with the prosecu- tor's anticipated cross-examination of O'Reilly on the general issue of credibility; appellant was further denied a fair trial in accordance with due process by reason of the prejudicial actions of the trial Court in demeaning his defense in the presence of the jury and in erroneously hampering the presentation of his defense	12
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
Appellee, :
-against- :
MICHAEL PATERNO, GEORGE DENTI :
and PATERNO AND SONS, INC., :
Defendants-Appellants. :
- - - - - x

PETITION FOR REHEARING
AND HEARING EN BANC

Appellant George Denti respectfully petitions this Court for a rehearing on his appeal and for a hearing en banc pursuant to Rules 35(b) and (c) and 40 of the Federal Rules of Appellate Procedure. The appeal was argued on July 17, 1974 before a panel of this Court consisting of Circuit Judge Mulligan, Circuit Judge Winter of the United States Court of Appeals for the Fourth Circuit, and District Judge Newman. Appellant's convictions were affirmed by order dated July 18, 1974. The Court's order was accompanied by a brief opinion which did not discuss the arguments hereinafter set forth, all

of which were raised on appellant's behalf in his brief and during oral argument.

Appellant respectfully submits that the decision of the panel, in sustaining appellant's indictment and convictions notwithstanding his having been unjustifiably deprived by the Government of his right to an administrative hearing, has sanctioned the Government's violation of the law in derogation of a substantial right of appellant, in contravention of previous decisions of this Court and of the Supreme Court of the United States, and in further contravention of the principles enunciated by the recent decision of the Supreme Court, rendered subsequent to the panel's decision, in the case of United States v. Nixon, et al., ___ U.S. ___ (1974), reprinted at 42 LW 5237. It is further respectfully submitted that the affirmance by the panel of appellant's convictions sanctioned the trial Court's errors in depriving appellant of his right to present his defense to the jury.

POINT I

AS TO THE GOVERNMENT'S DEPRIVING
APPELLANT OF HIS RIGHT TO AN
ADMINISTRATIVE CONFERENCE

Appellant's pre-trial motion for dismissal of the indictment on the grounds that he was not afforded any administrative conference as required by a published regulation of the Internal Revenue Service as a prerequisite for indictment for criminal tax offenses was denied by the trial Court. In attempting to sustain the trial Court's decision, the Government argued on this appeal that (a) the Internal Revenue Service regulation upon which appellant relied "was no longer in effect"** as of the time appellant claims to have been entitled to its protection, and (b) even if the regulation had been in effect, it could not be construed to limit the grand jury's power to indict. It is respectfully submitted that the Government's concessions during oral argument of facts which had theretofore remained undisclosed by the Government rebut the first part of the Government's argument, and established law rebuts the remainder.

* See Government's brief, p. 22.

(a) The Applicability of the Regulation

Section 601.107(b)(2) of the Internal Revenue Practice General Procedural Rules, promulgated in 1968 and in effect at the time of the investigation of appellant, provided:

"Every person who may be the subject of a recommendation for prosecution shall be given an opportunity to explain his participation in the alleged criminal violation prior to the submission of the case to Regional Counsel, unless compelling reasons exist to the contrary. At this interview the principal will be informed, by a general oral statement of the alleged fraudulent features of the case, to an extent consistent with protecting the Government's interests and, at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the nature, basis and other essential elements of the proposed criminal charge against him."

The language of this rule is clearly mandatory: the prospective defendant "shall be given an opportunity to explain his participation," and "will be informed . . . of the alleged fraudulent features of the case." The sole exceptions to the compulsory language of the rule are those cases where "compelling reasons exist to the contrary," and no such reasons have ever been suggested by the Government. The mandatory nature of the conference at the district level is highlighted by comparison to the discretionary nature of the decision to

grant conferences which is provided for in the regulations and practices applicable to the subsequent stages of administrative review within the Internal Revenue Service and the Department of Justice. See § 601.107(c)(1), Internal Revenue Practice General Procedure Rules; § 401.4 of the Regional Counsel Enforcement Division Manual; Defending Tax Fraud Prosecutions, "Administrative Processes After Investigation Is Complete", Richard M. Roberts, Deputy Assistant Attorney General in the Tax Division, United States Department of Justice, Practicing Law Institute, 69 (1970).

A revision of the rule, published as effective April 12, 1973, provides:

"A taxpayer who may be the subject of a criminal recommendation will be afforded a district intelligence conference when he requests one or where the Chief, Intelligence Division, makes a determination that such a conference will be in the best interests of the Government. At the conference, the IRS representative will inform the taxpayer by a general oral statement of the alleged fraudulent features of the case, to the extent consistent with protecting the Government's interests, and, at the same time, making available to the taxpayer sufficient facts and figures to acquaint him with the basis, nature, and other essential elements of the proposed criminal charges against him." § 601.107(b)(2), Internal Revenue Practice General Procedure Rules, amended April 12, 1973.

In its brief (at p. 25, fn.), the Government stated that "this case was referred to the Regional Counsel's office in April 1973." The Government chose not to disclose in its brief whether the referral of the case to Regional Counsel occurred prior or subsequent to the April 12, 1973 date upon which the governing regulation was effectively amended. During the course of oral argument, the Government disclosed* for the first time that the matter had been referred to Regional Counsel by, at the latest, April 11, 1973. Thus, as of the date when the case against appellant was referred to Regional Counsel, appellant had a right to a District Intelligence conference prior to that referral, and this right was simply

* Appellant's motion in the District Court sought, as an alternative to dismissal of the indictment, an evidentiary hearing at which the facts relating to the administrative proceedings could be ascertained. This alternative motion was also denied. Thus, the only "facts" now before the Court with respect to the timing of and conduct relating to the administrative steps that preceded appellant's indictment are the assertions made by the Government on appeal, which are made without factual support in the record. In this regard, it is respectfully noted that in the original draft of the Government's brief which was served upon counsel and the Court, the Government stated (at p. 25, fn.), "This case was referred to the Regional Counsel and the U. S. Attorney's Office in April, 1973" (emphasis added); this was changed in the Government's brief in final form to read, "This case was referred to the Regional Counsel's office in April, 1973." The indictment against appellant was filed on May 3, 1973.

ignored and violated by the Government. Before appellant's case was referred to Regional Counsel, appellant had a right to attempt to persuade the Internal Revenue authorities at a District Intelligence conference that the case against him should not be handled criminally. At this conference, formal rules of evidence would not have applied, and the evidentiary roadblocks that prevented appellant from adequately presenting his defense at trial (see supra, Point II) would not have existed. Yet the Government, without any justification or excuse, peremptorily deprived appellant of this right.

In attempting to circumvent the clear applicability of the regulation to appellant, the Government asserted in its brief (at p. 23) that "the right to such a conference was abolished on December 14, 1972", upon which date a wholly internal and unpublished memorandum, from the Assistant Commissioner (Compliance) and Chief Counsel to all Regional Commissioners and all Regional Counsel, was circulated within the Internal Revenue Service. This internal memorandum purported to revoke a taxpayer's right to an administrative conference as provided in the published regulation of the Internal Revenue Service then existing, and to replace it with a revised right as later contained in the amended regulation

effective April 12, 1973, which for the first time required a request by the taxpayer for such a conference. It is well-settled law, however, that a wholly internal memorandum such as that relied upon by the Government "was simply a housekeeping provision of the Department" which "was never promulgated as a regulation of the Department and published in the Federal Register," Sullivan v. United States, 348 U.S. 170, 173 (1954); as such it was of no legal effect and cannot be deemed to have abrogated appellant's right to a conference as granted by a published Internal Revenue Service regulation. This is further buttressed by the fact that when the published regulation was amended, the effective date of the amendment, as printed in the published amendment, was April 12, 1973, rather than the date of the internal I.R.S. memorandum.

Moreover, it is respectfully submitted that even if the amended regulation had been in effect prior to the referral of the case against appellant to Regional Counsel, the Government's actions in denying appellant his right to a conference would have required this Court to dismiss the indictment. Under the regulation as amended, appellant would have had an absolute right to an administrative conference by merely requesting one. Yet the Government conceded during oral argument that a decision had been unilaterally made by the

Internal Revenue Service not to grant appellant a conference even if one had been requested. Thus, a request for such a conference would have been a useless and therefore unnecessary act, by the Government's own admission.

(b) The Grand Jury's Power

The Government argued that even if appellant's right to an administrative conference had been violated, "a grand jury [may] proceed independently of prior administrative action" (Government's brief, p. 23). It is respectfully submitted, however, that notwithstanding the grand jury's undisputed broad powers, all grand juries are nevertheless instruments of the law and are bound by the law, and the validity of any grand jury's actions may be judged only within the framework of the law.

The recent decision of the Supreme Court of the United States in United States v. Nixon, supra, rendered subsequent to the decision of the panel in the instant case, has reaffirmed the vitality of the cases relied upon in appellant's main brief--United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957). As the Supreme

Court held in United States v. Nixon in sustaining the right of the Special Prosecutor to contest, pursuant to a published regulation issued by the Attorney General, the President's invocation of executive privilege.

"So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." ____ U.S. ___, 42 LW at 5241.

It is respectfully submitted that this principle governs disposition of the instant case. As this Court has elsewhere held,

"a validly promulgated regulation binds the government as much as the individuals subject to the regulation; and, this is no less so because the governmental action is essentially discretionary in nature When regulations prescribe specific steps to be taken to insure due process they must be substantially observed." Friedberg v. Resor, 453 F.2d 935, 937, 938 (2d Cir. 1971).

The power of a grand jury is not unlimited. It cannot return an indictment without the consent and signature of the United States Attorney. United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S. 935.

"[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, supra, ____ U.S. ___, 42 LW at 5240, citing with approval United States v. Cox, supra.

A grand jury therefore does not have the virtually unlimited power to return any indictment, as argued by the Government, and the Executive Branch has the power ultimately to control the decision to prosecute.

Throughout these proceedings, the Government has suggested no justification for its decision to deprive appellant of his right to an administrative conference. What happened in this case, it is respectfully submitted, is that the Government, for no justifiable reason or excuse, chose simply to violate the law and to deprive appellant of a substantial right. Under these circumstances, it is respectfully submitted that the only appropriate sanction, the only means of preservation of appellant's right to an administrative conference which the Government ignored, and the only effective means of deterring the Government from future violations, is for this Court to order dismissal of the indictment.

POINT II

SINCE THE WITNESS JAMES O'REILLY HAD BEEN GRANTED IMMUNITY AT THE TRIAL AT THE GOVERNMENT'S INSTANCE BY A SEPARATE ORDER RELATING TO HIS TRIAL TESTIMONY, IT WAS ERROR AND A VIOLATION OF DUE PROCESS FOR THE TRIAL COURT TO RULE THAT SUCH IMMUNITY WOULD NOT EXTEND TO THE TESTIMONY WHICH O'REILLY WOULD GIVE AS A DEFENSE WITNESS EITHER ON DIRECT- OR ON CROSS-EXAMINATION, AND TO REFUSE TO EXTEND SUCH IMMUNITY TO HIM, PARTICULARLY IN VIEW OF THE FACT THAT O'REILLY'S NEED OF IMMUNITY WAS SUGGESTED ONLY BY THE PROSECUTOR AND THE TRIAL COURT AND ONLY IN CONNECTION WITH THE PROSECUTOR'S ANTICIPATED CROSS-EXAMINATION OF O'REILLY ON THE GENERAL ISSUE OF CREDIBILITY; APPELLANT WAS FURTHER DENIED A FAIR TRIAL IN ACCORDANCE WITH DUE PROCESS BY REASON OF THE PREJUDICIAL ACTIONS OF THE TRIAL COURT IN DEMEANING HIS DEFENSE IN THE PRESENCE OF THE JURY AND IN ERRONEOUSLY HAMPERING THE PRESENTATION OF HIS DEFENSE

Appellant Denti adopts the arguments contained in the brief of appellants Paterno and Paterno and Sons, Inc. with respect to the errors claimed under this point.

Appellant Denti also adopts wherever applicable those points of law contained in the brief of Paterno and Paterno and Sons, Inc.

CONCLUSION

It is respectfully urged, for the reasons stated above, that this petition for rehearing be granted and that the petition for a rehearing en banc also be granted.

Respectfully submitted,

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